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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1998

JAMES L. HOOPER, M.D.,

Petitioner,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A.,

Nominal Respondent,

and

PASQUAL PERRINO, M.D.; STEPHEN DOLINSKY, M.D.; CHARLES KARESH, M.D.; SUSAN WITHROW, M.D.; HERBERT JUARBE, M.D.; CAROLYN BAIER, M.D.; AVANTI OF THE DISTRICT, INC.; SANUS CORP. HEALTH SYSTEMS; SCOTT A. ROTEMAN, t/a., SCOTT A. ROTEMAN, M.D., P.C.,

Respondents.

On Petition for Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Does an unpublished, nonprecedential, uncitable State appellate court opinion violate the Due Process and/or Equal Protection clauses of the Fourteenth Amendment when the opinion fails to apply *stare decisis*, the binding decisions of this Court, and/or creates rules of law applicable only to the particular case?

2. Is a State court's application of res judicata and collateral estoppel to preclude claims by a corporation which (a) was not a party in prior litigation, claimed to be relevant, which (b) could have received no benefit from such prior litigation, and which (c) was not in privity with the party through whom the estoppel by judgment was asserted, a violation of the Due Process clause of the Fourteenth Amendment?

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DECISIONS BELOW

The opinion of the Montgomery County Maryland Circuit Court (A.6) is unreported.[1] The decision of the Maryland Court of Special Appeals (A.1) and its denial of a motion for reconsideration and rehearing *en banc* (A.31) are unreported.[2] The order of the Maryland Court of Appeals denying certiorari (A.29) is unreported, as is its order denying a motion for reconsideration (A.30).

JURISDICTION

The judgment of the Maryland Court of Special Appeals was entered July 30, 1996 (A.5). That court denied a timely motion for reconsideration (A.33-41) on October 28, 1997 (A.31). The Maryland Court of Appeals denied a timely petition for a writ of certiorari on March 11, 1998 (A.29), and denied a timely motion for reconsideration on June 25, 1998 (A.30). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Section 1 of Fourteenth Amendment to the Constitution of the United States of America provides, in pertinent part:

> nor shall any State deprive any person of . . . property without due process of law; nor deny

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[1] "A." references are to the separately bound Appendix volume filed herewith.

[2] The Maryland Court of Special Appeals does not issue separate orders denying a motion for reconsideration. The denial is reflected in its mandate (A.31).

> to any person within its jurisdiction the equal protection of the laws.

Maryland Rule 8-113(a) provides, in pertinent part:

> The Court of Special Appeals shall designate for publication only those opinions that have substantial interest as precedent.

Maryland Rule 8-114 provides, in pertinent part:

(a) *Not authority.* An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of *stare decisis* nor persuasive authority.

(b) *Citation.* An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of *stare decisis* or as persuasive authority. * * *

STATEMENT

I. FACTS

In this case, a State appellate court used a nonprecedential and uncitable Unreported Opinion to avoid *stare decisis,* and to apply res judicata and collateral estoppel in a manner violative of the Due Process and Equal Protection guarantees of the Fourteenth Amendment.[3] The violations, which are clear and fundamental, were done

[3] Twenty years ago, this Court had before it the question of the validity of "Unreported" of "Unpublished" appellate court opinions which cannot be cited as precedent, or even as persuasive authority. The Court in *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257 (1978), elected to postpone consideration of the issue "to another day" (*Id.* at 259 n.1). This case presents again the issue not reached in *Browder*.

under circumstances that raise, at the least, an appearance of impropriety in the judicial process.[4]

In April, 1993, the majority stockholders of a medical practice, Perrino, Dolinsky, Karesh, Withrow, Jurabe & Baier, M.D., P.A. ("the Corporation"),[5] voted to sell substantially all its assets to Avanti of D.C., Inc., and Scott A. Roteman, P.C. ("Purchasers"), for a stated price of $1.5

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[4] This case was argued in the trial and appellate courts by Albert D. Brault, Esquire. We understand that Mr. Brault is Chairman of the Judicial Selection Committee in Maryland. That committee makes recommendations to the Governor of Maryland (usually accepted by the Governor) respecting judicial appointments. Brault's animosity toward Dr. Hooper was made evident by his *ad hominem* attacks throughout these proceedings.

The Panel in the Court of Special Appeals was Judges Cathel, Sonner, and Woodward. Judge Sonner had been represented by Mr. Brault. He refused a request made by Dr. Hooper's counsel prior to the beginning of oral argument to recuse himself. Judge Cathel (unknown to Dr. Hooper or his counsel) was being considered by the Judicial Selection Committee for elevation to the Maryland Court of Appeals. After the decision in this case, he was elevated. Judge Woodward at the time was a judge of the District Court (a level below the Circuit Court) in Montgomery County, Maryland, sitting by designation. After this decision, he was elevated to the Circuit Court.

Judge Thompson, the trial judge in this case, and Mr. Brault enjoyed a special and unrevealed relationship. Montgomery County, Maryland, has what is called an "*alter ego*" program. If a lawyer has a complaint about a judge, the lawyer brings the complaint to the judge's "*alter ego*" who then talks to the judge. Mr. Brault was Judge Thompson's "alter ego." He had both special access to Judge Thompson, and a unique relationship with him. (After entry of judgment, Judge Thompson granted Petitioner's motion to recuse himself from further participation in the proceedings — a pending motion for sanctions.) *See* n.17, *infra.*

[5] The Corporation at that time was named Montgomery Medical Group, P.A. It adopted its current name in April, 1993, at the time it voted to sell its assets, as discussed, *infra.*

million — very slightly more than the corporate debit.[6] The Corporation has seven stockholders, six of whom are its only officers and directors, and were, at all relevant times, corporate employees.[7] Together, they own 85% of the stock. The balance of the shares are owned by Petitioner, James L. Hooper, M.D., who founded the medical practice in 1964 and over the years hired all the other shareholders. The six other shareholders/directors terminated Dr. Hooper's employment and directorship in 1991.[8]

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[6] Sanus Health Care Systems owns Avanti of D.C., Inc. It guaranteed the purchase contract. It was named a defendant and is included within the term "Purchasers."

[7] The six are Pasqual Perrino, M.D., Steven Dolinsky, M.D., Charles Karesh, M.D., Susan Withrow, M.D., Herbert Juarbe, M.D., and Carolyn Baier, M.D. ("Individual Defendants").

[8] In January, 1992, Dr. Hooper sued the Corporation in Federal court for the termination of his employment, alleging Age Discrimination, Breach of Contract, and an ERISA violation. He also sued the Individual Defendants, making a variety of claims, none of which related to the sale of the Corporation. Such sale was not even contemplated at the time of the Federal suit. In fact, the district court refused to entertain an amended complaint dealing with the April, 1993 sale, stating that "the new claims — to the extent they are of merit — can be, and should be, the subject of a separate state court action" (District Court Opinion of June 30, 1993, in *Hooper v. Montgomery Medical Group, P.A., et al.* (USDC Md. C.A. No. 92-529)). The court entered summary judgment against Dr. Hooper on all claims except the ERISA count, on which Dr. Hooper, in essence, prevailed and was awarded attorney's fees. Dr. Hooper's counsel in that case was sanctioned by the district court under FRCP Rule 11. The Fourth Circuit affirmed both summary judgment and the sanctions (4th Cir. Nos. 93-2631, 94-1022, 1038, 1056, and 1141, March 3, 1995 (Unpublished)). By a 2 to 1 vote the court of appeals denied a timely petition for rehearing directed both to the merits and the sanctions. This Court denied certiorari *sub nom. Hooper v. Perrino*, 516 U.S. 864 (1995). Thereafter, counsel for the Individual Defendants (Albert D. Brault and David G. Mulquin) and for Montgomery Medical Group (Paul T. Stein and Jeffery M. Schwaber) were sanctioned by the district court for what that court termed their "double violation" of FRCP Rule 11. All defense counsel noted an appeal which they voluntarily dismissed.

As part of the sale of assets transaction, the six officers/directors were paid $1.8 million in bonuses and for noncompetition agreements. They also received employment contracts at salaries approximately 30% higher than comparably situated physicians employed by the Purchasers. The true agreed sale price (and fair market value) of the Corporation's assets was well over $3 Million. The Corporation received substantially less than half that sum. The balance was paid directly to the Individual Defendants via the salary, bonus, and noncompetition agreements, thereby avoiding two–tiered taxation.[9]

Petitioner, in his capacity as an individual stockholder, sued the six other stockholders, alleging that they fraudulently, and to his detriment, appropriated to themselves assets of the Corporation.[10] He sought compensation for himself, only. The Corporation was not a party to that suit, styled *Hooper v. Withrow, et al. See* A.24. Had Dr. Hooper prevailed, the Corporation would have received no benefit. *Hooper v. Withrow* was a suit by an individual against other individuals seeking recovery solely and directly for Dr. Hooper.

Judge Ryan of the Montgomery County Circuit Court granted the Individual Defendants' motion to dismiss *Hooper v. Withrow.* He ruled that Dr. Hooper's sole individual

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[9] By facially selling the assets for less than their true worth, the Individual Defendants very substantially lessened both Federal and State taxes. Because the sale price was only slightly more than the corporate debt, the Corporation incurred a very small tax liability. The majority of the real purchase price passed directly to the Individual Defendants *sans* corporate tax. The Purchasers, too, reduced their tax liabilities by being able to expense, rather than capitalize, the majority of the true purchase price.

[10] Just prior to the shareholder's meeting to vote on the sale, Dr. Hooper sought to enjoin the meeting. When a temporary injunction was denied by the Montgomery County Maryland Circuit Court, he voluntarily dismissed that suit. No formal order was entered denying the injunction, and there was no judgment.

remedy was the Appraisal Procedure provided in Md. Code Ann., Corps. & Ass'ns Art. § 3-201, *et seq.*[11]

Hooper v. Withrow was decided on the pleadings, only. No discovery was had. No evidence was taken. Judge Ryan ruled only that Dr. Hooper had chosen a remedy unavailable to him — that he had chosen the wrong remedy (A.26-28). The Maryland Court of Special Appeals affirmed in a *per curiam* Unreported Opinion (A.13-23). The Maryland Court of Appeals denied certiorari (339 Md. 167 (1995)).

In April, 1996, Dr. Hooper instituted this stockholder's derivative action against the officers/directors of the Corporation alleging, *inter alia*, that through noncompetition, bonus, and employment agreements they misappropriated corporate assets in violation of fiduciary duties owed to the Corporation, and obligations to the Corporation's creditors.[12] The Purchasers also were named

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[11] Maryland, like many other states, provides a remedy for an individual stockholder dissatisfied with a terminal corporate transaction. In essence, his shares are appraised as through the corporation were an ongoing entity, and he sells his shares at that price to the successor. Usually, though not always, this is the shareholder's exclusive remedy. In the case before Judge Ryan, Dr. Hooper contended that there were factors that did not require him to use the appraisal remedy, because such remedy was inadequate in the circumstances, and that he in fact was precluded from the appraisal procedure because he would be required, if he used it, to make a prohibited transfer of professional corporation stock. Maryland law prohibited transfer of such stock to other than a qualified individual person, not permitting transfer to either a general business or other professional corporation. Notwithstanding the prohibitions and general definitions of what constitutes a "transfer" of securities, the trial court and the Court of Special Appeals held such a transfer is not precluded if the ineligible transferee of such shares states an intent to transfer the acquired shares to a qualified person. Though there is no law that supports such a holding, this novel rule, like in the case at bar, was stated in an Unreported Opinion — an unbinding decision with no precedential value — a rule applicable only to Dr. Hooper's case. *See* A. 13-28.

[12] Maryland does not require a demand to be made on the corporation for corrective action prior to instituting a derivative suit if the demand would

defendants. The objective of this derivative action is to recover for the Corporation its assets that were misappropriated by its officers and directors, in collusion with the Purchasers.[13] The suit seeks nothing for Dr. Hooper. Its sole objective is payment to the Corporation, which was not a party in the prior action, and which would have received no benefit of any kind had Dr. Hooper succeeded in his suit before Judge Ryan — *Hooper v. Withrow*.

The Montgomery County Maryland Circuit Court (Thompson, J.) dismissed this derivative action as barred by res judicata and collateral estoppel arising from *Hooper v. Withrow*. It held that estoppel by judgment applied because only Dr. Hooper would benefit from a recovery.[14] It overlooked: (1) that this suit is in reality a suit by the Corporation against officers and directors for breaches of

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have been futile. The trial court found a demand would have been futile, and, therefore, was not required (A.8-9). Though a derivative action is for the benefit of the corporation, the corporation is nominally named a defendant because of its failure or refusal to act to protect its interests. *See* 19 Am. Jur. 2d *Corporations* § 2402 at 253; 18 C.J.S. *Corporations* § 412 at 756; Harry G. Henn and John R. Alexander, *The Laws of Corporations* §§ 358, 369 at 1035, 1037, 1080 (3d ed. 1983).

[13] The Complaint in this case seeks "a judgment in favor of [the Corporation] against the Defendants" for compensatory and punitive damages, and the appointment of a receiver to marshall the assets of the Corporation and to oversee its dissolution.

[14] The court did not specifically state which parties were entitled to assert res judicata and which parties could rely on collateral estoppel. We assume the court held that the Individual Defendants could rely on res judicata, and that the Purchasers could claim a bar based on collateral estoppel. *See Cassidy v. Board of Education*, 316 Md. 50, 57, 557 A.2d 227, 230 (1989) (res judicata requires, *inter alia*, that the two actions are between the same parties); *Caldor v. Bowden*, 330 Md. 632, 657, 625 A. 2d 959, 971 (1993) (collateral estoppel may be asserted by persons not a party to prior litigation if there is an identity of parties against whom the preclusion is asserted, and if there is an identity of claims).

fiduciary duties owed to the Corporation;[15] (2) it is irrelevant and immaterial under Maryland precedent that the officers and directors also are stockholders; and (3) that only the Corporation, a separate person in law, could benefit from a recovery. Thus, only the Corporation (or a stockholder, derivatively) properly could bring an action to recover for the Corporation its misappropriated assets.

The Maryland Court of Special Appeals affirmed. It ruled, despite a clear recognition that this is a derivative suit (A.2-4), as through Dr. Hooper had brought an individual action against the Corporation and the officer/director defendants seeking the same individual relief he sought in *Hooper v. Withrow*. The decision, a *per curiam* Unreported Opinion, ignored that the Corporation is a nominal defendant, only, that this action is for the benefit of the Corporation that was not a party in *Hooper v. Withrow*, and that the Corporation could have received no benefit from that prior litigation. It failed to apply Maryland and generally applicable rules of corporation law and estoppel by judgment. It created novel rules applicable only to this case. The Unreported Opinion is not precedent, or even persuasive authority. *See* Md. Rule 8-114(a). A timely motion for reconsideration with a request for rehearing *en banc* (A.33-41) was denied (A.31). The Maryland Court of Appeals denied certiorari (A.29) and a timely motion for reconsideration (A.61-62)[16] of that denial (A.30).[17]

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[15] As stated, *supra*, the suit also names the Purchasers for their collusion with the officers/directors to misappropriate corporate assets.

[16] The motion for reconsideration also requested, *inter alia*, a remand to the Court of Special Appeals with a direction to publish the decision should the decision be allowed to stand (A.62).

[17] Subsequently, the Montgomery County Circuit Court (Scrivener, J.) assessed $30,000 in sanctions against Dr. Hooper for bringing this derivative action. It awarded $10,000 to the Individual Defendants, $10,000 to the Purchasers, and $10,000 to the nominal corporate

II. FEDERAL CONSTITUTIONAL ISSUES TIMELY RAISED

The Federal Due Process res judicata/collateral estoppel issue was raised in the brief to the Maryland Court of Special Appeals, in the motion for reconsideration in that court (A.34, 36, 41), and in the petition for a writ of certiorari to the Maryland Court of Appeals (A.43-44, 46,48, 54-95). Dr. Hooper's main brief in the Court of Special Appeals states at 20 n.24:

> Cases from other jurisdictions also support the conclusion that because of a lack of identity of parties this action is not barred by the prior judgment. * * * A party who unsuccessfully litigated a claim is not barred from suing in a representative capacity solely for the benefit of other parties not in privity with her. To deprive such other parties of their day in court would violate Due Process. *Alderman v. Chrysler Corp.*, 480 F.Supp. 600 (E.D. Va. 1979).

Dr. Hooper raised the Federal Due Process and Equal Protection issues relating to the Unreported Opinion of the Court of Special Appeals in his petition for a writ of certiorari to the Maryland Court of Appeals (A.48, 58-60), and in his motion for reconsideration in that court (A.62).[18] *See also* n.16, *supra*.

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defendant. Both a motion for reconsideration and an appeal were filed and remain pending. *See* n.4, *supra*.

[18] The motion for reconsideration in the Court of Special Appeals also raised the impropriety of use of the Unreported Opinion in this case (A.40).

No Maryland court mentioned, let alone addressed, the Federal Constitutional issues. The Maryland courts disregarded the Constitutional issues.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This Petition presents matters (including a question on which this Court previously granted certiorari but did not decide)[19] that go to the very heart, not only of the judicial system, but to the most basic underpinnings of an orderly and stable society. At issue is the place of *stare decisis* in the judicial system, the importance of treating all litigants equally, and of not depriving any person (including a corporation) of an opportunity to be heard before ruling adversely to it.[20]

Confidence in the courts is essential to the maintenance of domestic order. Selective or unpredictable treatment of litigants, on the other hand, sows the seeds of chaos. Use of an Unreported Opinion to side-step *stare decisis* not only is destablizing; it is *per se* Unconstitutional.

The Constitutional mandate of the Fourteenth Amendment requires that State courts insure that litigants are afforded Due Process, and that all persons are treated equally — that they be given the "equal protection of the laws." The Amendment also prohibits deprivation of "property, without due process of law." Similarly, it

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[19] *See* n.3, *supra*, and, *infra*.

[20] "[C]orporations are persons within the meaning of Constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of equal protection of the laws." *Covington and Lexington Turnpike Road Company v. Sandford*, 164 U.S. 578, 592 (1896).

prohibits any State from denying any person "the equal protection of the laws" (*Id.*).[21]

II. THE USE OF AN UNREPORTED OPINION IN THIS CASE VIOLATED THE FOURTEENTHA MENDMENT

A. This Issue Is of Grave National Importance: It Impacts Both Federal and State Jurisprudence

1. *This Court Previously Granted Certiorari on This Issue*

Twenty years ago, in *Browder v. Director, Ill. Dept. of Corrections*, *supra*, this Court granted certiorari on the issue of "the validity of the Seventh Circuit's `unpublished opinion' rule" (434 U.S. at 259 n.1). That is substantially the issue presented here. According to briefs filed in *Browder*,[22] the question as to which certiorari was granted was:

> May a United States Court of Appeals reverse a decision of a district court in an unpublished and noncitable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in

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[21] As stated, *supra*, n.20, the Constitutional protections apply to corporations.

[22] The petition for a writ of certiorari was not included in the bound volumes in this Court's library.

enacting a statute to protect its citizenry from warrantless arrests for investigation?

The nub of the question there and here is the Constitutional validity of rules like the Seventh Circuit Rule (now Rule 53), and similar rules in other Federal circuits and in State courts, that permit an appellate court to issue "unpublished opinions"[23] that depart from, change, or develop the law, and which, like the opinion in this case, cannot be cited for purposes of *stare decisis*, or even as persuasive authority.[24]

In *Browder*, the Court, after granting certiorari, determined that the question of the validity of the "unpublished", nonprecedential, uncitable, appellate court opinion would be left "to another day." We respectfully submit that day has come. The issue has "percolated" long enough — transformed in the 20 years since *Browder*, from a liquid into a thick, gooey mass, corroding pillars of our jurisprudence.

2. *The nonprecedential, un-citable, unpublished, appellate court opinion is used by 6 United States Courts of Appeals and in at Least 18 States*

"Unpublished", nonprecedential, uncitable opinions are issued in six Federal circuit courts of appeals.[25] At least

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[23] "Unpublished Opinion" and "Unreported Opinion" are synonymous.

[24] The unpublished opinion was suggested as a means of reducing the increasing burdens being placed on appellate courts. *See* William L. Reynolds and William M. Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 7\8 Colum. L. Rev. 1167,1168-1172 (1978).

[25] The six circuits prohibiting citation are the First, Second, Seventh, Eighth, Ninth, and Federal. The Third, Fifth, Sixth, Tenth, and Eleventh Circuits permit citation of unpublished opinions as persuasive authority.

18 states, including some of the largest, *e.g.*, California, Pennsylvania, Texas, Illinois, use the procedure.[26] Thus, the issue of the Constitutional validity of what Justice Stevens termed "secret law" (*County of Los Angeles v. Kling*, 474 U.S. 936, 938 and n.1 (1985) (dissenting opinion)) impacts throughout American jurisprudence. It affects both civil and criminal cases. It is difficult to imagine an issue more sweeping in scope. It is not simply a policy matter. The issue is what the Constitution mandates and permits. No policy considerations can contravene the most fundamental policies of this Republic — Constitutional guarantees of the Bill of Rights and the Fourteenth Amendment. In *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), this Court stated (footnote omitted):

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

While the Fourth Circuit does not favor citation of unpublished opinions, it considers all its decisions precedent. See *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972). The Rules of the District of Columbia Circuit are silent as to the precedential effect and citability of such decisions.

[26] See Mark D. Hinderks and Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 Washburn L.J. 155, 163 n.50 (1992), summarizing the situation at that time in the State courts.

B. Nonpublication Is Inconsistent with the Policies Underlying *Stare Decisis*

The bed-rock of our legal system is precedent. *Stare decisis* is the foundation on which our legal system rests. Appellate court opinions guide lower courts. Precedent is the means by which lawyers determine "the law", advise clients with respect to a myriad of matters, both business and personal, and make judgments whether to institute litigation, to continue litigation, or to settle, or seek to settle, a particular case, including criminal matters.

> [T]here will be no equal justice under law if a negligence rule is applied in the morning and not in the afternoon. * * * *Stare decisis* serves to take the capricious element out of the law and to give stability to a society.

William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949) (Eighth Annual Benjamin N. Cardozo Lecture, April 12, 1949).

> "To allow judicial slight-of-hand to create a body of law exempt from [*stare decisis*] would assault a rudimentary underpinning of our legal system. *Stare decisis* is fundamental to our 'scheme of ordered liberty' . . ."

David Dunn, *Unreported Decisions in the United States Courts of Appeals*, Note, 63 Cornell L. Rev. 128, 144 (1977) quoting Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

> *Stare decisis* . . . was firmly established centuries ago. In the United States, *stare decisis* has remained "the everyday working rule of our law." * * * The evolution of

> precedents provides a structure of stability and continuity so that men and women may arrange their affairs with confidence, while critical reexamination of precedents provides for healthy adoption to changed circumstances. * * *
>
> From the case method . . . , future lawyers are taught to search for the law within the record of what courts do about disputes. We are taught to search for the particular holding of the case in the context of the dispute before the court, from which its precedential effect can be considered.

Hinderks & Leben, *Restoring the Common in the Law, supra,* 31 Washburn L. J. at 168-169 (footnotes omitted).

> [T]he use of precedent in decision-making promotes several policies inherent in the common law * * * First, the use of precedent promotes stability and uniformity, protecting reliance and expectation interests of those subject to the law in an atmosphere of incremental change. Second, the use of precedent promotes fairness between parties in like situations, and validation of the appearance of such fairness by institutionalization of the decision-making process. Third, the use of precedent promotes conservation of judicial resources by placing the full previous decision-making record before the Court, in order that it may avoid addressing settled questions anew, and have before it the full directional flow of the law over time.

> By contrast, no-citation rules interfere with each of these policies. Such rules interject uncertainty into the law, interfering with its stability and uniformity, and impinging on the ability of those subject to the law to have reasonable reliance and expectation interests. A noncitable case on its face appears to state or follow a rule . . . that one would ordinarily expect the court to follow if presented with the same scenario in the future. However, because the non-citable decision cannot legally be brought to the attention of a subsequent court in the same jurisdiction, the matter of stability and uniformity is left primarily to accident, particularly when a subsequent appellate panel may have a different philosophical view of the matter. * * *
>
> No citation rules similarly affect both the existence and appearance of fairness between cases. * * * [W]hether or not an inconsistent result actually does occur, the possibility serves to create doubt in the minds of litigants about the appearance of fairness.

Id. at 184-185. *Compare* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 783 n.41 (1983) ("Although unpublished opinions may indeed save time, they limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts.")

C. Use of an Unreported Opinion to Side-Step *Stare Decisis* is *Per Se* Unconstitutional

The Court of Special Appeals, which, according to the Maryland Administrative Office of the Courts, issued Unreported Opinions in over 85% of the cases it decided in FY 1997,[27] decided several issues contrary to Maryland precedent. Yet, it chose to keep its decision "secret", allowing it to apply these rules only in this case. *See Kling, supra*, 474 U.S. at 938 (Justice Stevens dissenting).

First, the court held that a nonparty, who is not in privity with a party in a prior action, is bound by the prior judgment.

Second, it held that dismissal of an action for having chosen an unavailable remedy is a judgment on the merits against a nonparty.

Third, it ruled that a stockholder's derivative action is an action seeking a recovery from the corporation for whose benefit the action was brought.

All three rulings are contrary to prior Maryland case law.[28] They cannot, consistent with Due Process and Equal Protection, be applied to a single case, preserving the prior published decisions as precedent to determine future cases. The Maryland courts in this case have demonstrated the most pernicious use of the Unreported, uncitable, nonprecedential, nonconforming appellate opinion.

In Maryland (and other jurisdictions that use such opinions), the law may, by use of the Unreported Opinion, be

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[27] The figures we received were that there were 1,580 majority opinions issued. Of these, 225 were Reported (less than 15%), while 1,355 (over 85%) were Unreported.

[28] The inconsistency with precedent is detailed at A.37-41, 46-48, 50-58, and, *infra*. By not publishing, the Court of Special Appeals, as discussed, *infra*, substantially diminished the possibility of further review.

applied in a particular case if and when the courts chose to do so. No lawyer or lay citizen can rely on precedent. A rule applied on Monday may not be applied on Tuesday, and there is no published explanation of the change. Worse yet, anyone who might learn of the Unreported new, changed, or expanded rules cannot rely on them. The court, not bound by its own decisions, may chose to revert to previously published or unpublished rules of the law, or to create or apply entirely different rules solely to a particular case. Litigants, as well as others who look to the law to make important judgments, would do as well to blindfold themselves and throw darts at a board to guide their decisions. Such is not the stuff of an orderly society, let alone a "scheme of ordered liberty." There is no "ordered liberty" without the evenhanded application of the "Rule of Law." Judicial instability is the vanguard of societal disintegration.

The practice affords neither Due Process nor Equal Protection of the laws. The Constitution mandates that comparably situated persons be treated the same. While the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, * * * when an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

D. Nonpublication Impermissibly Limits the Possibility of Further Appellate Review

Arbitrary determination whether a decision is to have precedential value, or whether it can be cited even as persuasive authority, does not pass Constitutional muster. There is no enforceable requirement that the decision be reconciled with published precedent. Whether by judicial fiat or honest misjudgment, it often is not possible to

evaluate whether a decision at the time it is rendered has potential to influence the law and be of interest to persons other than the parties then before the court.

> [A] rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.

Reynolds & Richman, *The Non-Precedential Precedent Precedent, supra,* 78 Colum. L. Rev. at 1192, quoting Justice Stevens January 22, 1977 remarks at the Illinois Bar Association's Centennial Dinner.

The failure to publish an opinion that departs from, expands, or changes precedent impermissibly limits the litigants' opportunity to obtain further discretionary appellate review. The highest court of a State like Maryland reviews cases decided by the Court of Special Appeals only on writ of certiorari. The criterion is whether review "is desirable and in the public interest" (Md. Code Ann., Cts. & Jud. Proc. Art. § 12-203). *See* A.29. A court exercising supervisory power is less likely to review an unpublished, nonprecedential, uncitable opinion even if the decision is wrong, does not follow precedent, or simply creates "bad law." That same opinion, if published and precedent, might well be reviewed. *See* Reynolds and Richman, *The Non-Precedential Precedent, supra,* 78 Colum. L. Rev. at 1202-1203. *Compare* William L. Reynolds, II, *The Court of*

Appeals of Maryland: Roles, Work and Performance — Part I, 37 Md. L. Rev. 1, 31 (1977), noting the disparity between reviewed *per curiam* decisions of the Court of Special Appeals and published decisions of that court, stating:

> [T]he Court of Appeals might be generally less interested in per curiam Court of Special Appeals Opinions because they have not been published and cannot, therefore, be used as precedent. Review, therefore, would serve only to correct error in the case at bar and not to correct error in doctrine.

By allowing a court, particularly an intermediate appellate court to which there is an appeal of right (*see* Md. Code Ann., Cts. & Jud. Proc. Art. §§ 12-301, 12-308; Md. Rule 8-201), to choose which of its opinions to publish as precedent, and which even are citable, the court rending the opinion is given unintended power to influence which of its decisions are insulated from further discretionary review. By not publishing, the court telegraphs that it believes the particular case "unimportant", or at least "unimportant" as a jurisprudential matter. Effectively, the court goes beyond its statutory mandate to decide appeals of right.

The problem of selective publication and precedent is not confined to Maryland. Its pervasiveness has been illustrated.[29] The nonpublication rule is not applied simply to those cases that are not precedent, do not add to precedent, or do not develop the law. *See* Hinderks & Leben, *Restoring*

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[29] The most recent information we have found is that on average, less than 40% of United States Courts of Appeals decisions are published — that over 60% are "Unpublished." *See* Hinderks and Leben, *Restoring the Common in the Law*, *supra*, 31 Washburn L. Rev. at 158. *See also* William L. Reynolds and William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 587 (1981), showing percentages by circuit. As stated, *supra*, the Maryland Court of Special Appeals published less than 15% of its decisions in FY 1997. *See* p. 17 n.27, *supra*.

the Common in the Law, supra, 31 Washburn L.J. at 188-212 (analyzing unpublished Kansas cases); James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975) (analyzing unpublished Ninth Circuit decisions).[30] There is no reason to believe the experiences in those jurisdictions are unique. Indeed, as this Maryland experience demonstrates, there is every reason to believe otherwise.

In sum, the "Unpublished" or "Unreported", nonprecedential, uncitable appellate court opinion presents serious questions of a fundamental nature, and of Constitutional dimension. This Court previously deemed the issue of sufficient importance to grant certiorari. The problems created by the so-called "disposable opinion"[31] have not lessened. They have increased. The time is ripe to address this issue.

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[30] We also note that the Court of Special Appeals opinion in *Hooper v. Withrow* (A.13-23) was a development of the law, and dealt with issues not previously addressed in published opinions. The Court of Special Appeals devoted over 10 printed pages to its explanation. That not withstanding, like this case, the opinion was "Unreported."

[31] *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigation in the United States Courts of Appeals*, 87 Mich. L. Rev. 940 (1989), arguing against limited publication.

III. THE COURT OF SPECIAL APPEALS DECISION UNCONSTITUTIONALLY APPLIED ESTOPPEL BY JUDGMENT TO A PERSON THAT WAS NOT A PARTY, AND NOT IN PRIVITY WITH THE PARTY THROUGH WHOM THE ESTOPPEL WAS CLAIMED

A. IMPORTANCE

The question of the Constitutional limits of res judicata previously has been addressed by this Court. *See Richards v. Jefferson County*, 517 U.S. 793 (1996), and cases therein cited. Thus, the Court has recognized the importance of determining when the Constitution limits a State's authority to make legal rules that may deny any person a "day in court." This case presents the important question whether an abortive individual action by a minority shareholder may bind a corporation on issues it never had the opportunity to litigate, and which in fact never were litigated at all.

Res judicata and collateral estoppel (estoppel by judgment) are basic parts of our jurisprudence. Their Constitutional limits are fundamental.

B. THE CORPORATION WAS DENIED DUE PROCESS BECAUSE IT NEVER HAD AN OPPORTUNITY TO BE HEARD

The Court of Special Appeals gave res judicata and collateral estoppel an Unconstitutional reach. It held that a person (in this case the Corporation)[32] that was not a party in

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[32] *See* n.20, *supra*.

the prior action, which was not in privity with Dr. Hooper,[33] and that could have received no benefit from Dr. Hooper's prior action, is estopped by the prior judgment from seeking relief for the misappropriation of its assets.

Assuming, *arguendo*, that Dr. Hooper's individual suit before Judge Ryan were a determination on the merits *vis a vis* Dr. Hooper's individual rights, such suit could not, consistent with Fourteenth Amendment Due Process requirements, determine the rights of a non-party corporation not in privity with Dr. Hooper.[34] The Maryland Courts denied the Corporation the opportunity to be heard.

While stating that States are free to fashion their own rules of estoppel by judgment, this Court has "long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is `fundamental in

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[33] It is clear that Dr. Hooper did not control the Corporation, and was not its *alter ego*. Therefore, he was not in privity with it.

[34] The prior action determined only that Dr. Hooper chose the wrong remedy. It therefore was not a judgment on the merits. The courts below misapplied a case over half a century old (*Williams v. Messick*, 177 Md. 605, 11 A.2d 472 (1940)) to support their conclusions. In *Messick*, in which Due Process was not raised, the court held that where a stockholder unsuccessfully brought an individual suit to have a receiver appointed for a corporation, he was precluded from seeking the same relief for the corporation in a derivative suit. *Messick* makes plain that, unlike the case here, the action there was determined on the merits on evidence taken. It made clear, however, that res judicata would not bar the second action where, as here, the first case was dismissed because the plaintiff chose the wrong remedy. *See* 177 Md. at 610-611, 11 A.2d at 474-475. Other Maryland cases hold similarly. *See also Moodhe v. Schenker*, 176 Md. 259, 267, 4 A.2d 453, 457 (1939); *Cassidy v. Board of Education*, *supra*, 316 Md. at, 63, 557 A.2d at 233. *Messick* is inapposite because there (a) the first action was determined by a full trial on the merits, and (b) both actions were seeking the same relief for the corporation. In this case, there was no trial on the merits, and the first action sought nothing for the Corporation. In this case, the Corporation never was given an opportunity to assert its rights. Such rights are separate and distinct from Dr. Hooper's individual rights.

character.'" *Richards v. Jefferson County, supra, 517 U.S. at 797.*

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. * * * The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. * * * And as a State may not, consistent with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . ., so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

Id. at n.4 (citations omitted), quoting from *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918). *See also Alderman v. Chrysler Corp.*, 480 F.Supp. 600, 607 (E.D. Va. 1979) (loss on an issue sued on in a personal capacity does not bar a subsequent suit in a representative capacity; to hold otherwise would violate Due Process).

The courts below misapplied res judicata and collateral estoppel in an extreme manner "inconsistent with a federal right `fundamental in character.'" Their misconception of the nature of a stockholder's derivative action stripped the Corporation of rights guaranteed it by the Fourteenth Amendment.[35] By treating an action clearly for

[35] The misconception is confusing since the Court of Special Appeals correctly stated that the right to recover for misappropriation of corporate assets is vested in the Corporation. *See* A.4, and *infra.*

the sole benefit of the Corporation as an action against the Corporation, the courts below deprived the Corporation of its "day in court" and any opportunity to recompense the wrongful misappropriation of its assets by its fiduciaries. Because the wrong done was to the Corporation, Dr. Hooper, according to Maryland law and corporation law generally, had "no [individual] right of action." *Waller v. Waller*, 187 Md. 185, 194, 49 A.2d 449, 454 (1946); *O'Donnell v. Sardegna*, 336 Md. 18, 28, 646 A.2d 398, 403 (1994). "[I]f allocation of funds as consideration for a noncompete agreement results in a corporation receiving less than fair market value for the sale of its assets, then the officer or director is unlawfully diverting funds belonging to the corporation." *Wagner v. Foote*, 128 Wash.2d 408, 413, 908 P.2d 884, 886 (1996), citing *Pupecki v. James Madison Corporation*, 376 Mass. 212, 217, 328 N.E.2d 1030, 1033 (1978).

The Court of Special Appeals correctly stated the rule: "[W]here directors commit a breach of trust, they are liable [only] to the corporation" (A.4), citing *Waller v. Waller, supra*. It then refused to apply *Waller* in this case. *Waller* clearly states that such rights can be enforced only by the corporation, or through a stockholder's derivative action. 187 Md. at 190-191, 49 A.2d at 452-453. *See also O'Donnell v. Sardegna, supra*, 336 Md. at 28, 646 A.2d at 403.

The reasoning of the courts below that a derivative action is barred because only Dr. Hooper would benefit is circular and Constitutionally flawed. This Unreported Opinion created a rule of law that deprived the Corporation of a fundamental right. The decisions below stand for the proposition that corporate officers and directors who collectively own a controlling interest in a corporation may breach fiduciary duties they owe to the corporation and that such corporation has no remedy. In other words, the courts below ruled that if there is a single stockholder who has not participated in the wrongdoing, and who mistakenly brought

suit against the other stockholders as individuals (an unavailable remedy), he may not bring a derivative action (for the corporation) against the officers and directors, who, in their corporate capacities, misappropriated the corporate assets. That is nonsense. *See Parish v. Maryland and Virginia Milk Producers Ass'n*, 250 Md. 24, 85, 242 A.2d 512, 546, (1968), *appeal after remand* 261 Md. 618, 277 A.2d 19 (1971), *cert. den.* 404 U.S. 940 (1971) (officers and directors who own a controlling interest in a corporation may not legally use such control to ratify their fraud against, or breach of fiduciary duties they owe to, the corporation). Application of res judicata and collateral estoppel to achieve that result plainly deprived the Corporation of its "day in court" in violation of Constitutionally mandated Due Process guarantees.[36]

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,
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[36] As set forth, *supra*, this Unreported Opinion established rules of law, apparently applicable only to this case. These rules — contrary to all Maryland precedent and generally applicable principles of corporation law — need not be followed or even discussed in future cases. Indeed, the Unreported Opinion may not be cited even as persuasive authority.